LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
OCT 26 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966.

No. 727

GEORGE S. STAYNER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

JEROME B. TOBIAS,
Attorney for Petitioner,
58 East Route 59,
Nanuet, N. Y.

THE REPORTER COMPANY, INC., New York, N. Y. 10007—RE 2-6978—1966

(6565)

Index to Petition.

	Page
Petition	1
Citation to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	6
Conclusion	9

APPENDICES.

APPENDIX A. Statutory provisions involved	A1
APPENDIX B. Opinion of the United States Court of Appeals for the Second Circuit	A1
APPENDIX C. Judgment of the Court of Appeals sought to be reviewed	A2

TABLE OF CITATIONS.

CASES CITED:

Bollenbach v. United States, 326 U. S. 607	2, 6, 7
Boyd v. United States, 142 U. S. 450	7

STATUTE CITED:

26 U. S. C. 7203	2

IN THE

Supreme Court of the United States

DECEMBER TERM, 1966.

No. .....

GEORGE S. STAYNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, GEORGE S. STAYNER, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled action on September 30, 1966, which judgment affirmed a judgment of conviction of the United States District Court for the Southern District of New York, dated and filed on April 7, 1966.

Citation to Opinion Below.

No opinion was rendered herein by the United States Court of Appeals for the Second Circuit. The case has not as yet been officially reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 30, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented.

1. Were not the principles laid down in *Bollenbach v. United States,* 326 U. S. 607 (1946), violated where, in a prosecution for failure to timely file a tax return, the jury, after having retired for 90 minutes, asked the Trial Judge whether petitioner was charged with "willful intent to not file a tax return" or with "willful intent to defraud the United States Government of tax evasion," whereupon the Trial Judge repeated the same instructions previously given?

2. Was not petitioner denied a fair trial by reason of (a) evidence of alleged prior wrongful acts wholly unrelated to the crime charged, (b) petitioner's lengthy cross examination by the Trial Judge, and (c) the Trial Judge's failure to instruct the jury to disregard testimony to which petitioner objected, when his objections were sustained?

Statute Involved.

The statutory provision involved is 26 United States Code, Section 7203. It is printed in Appendix A, *infra.*

Statement.

On January 28, 1965, a three-count information was filed charging Dr. George S. Stayner, the petitioner, with willful failure to file timely income tax returns for the calendar years 1958, 1959 and 1960 in violation of Sec-

tion 7203 of the Internal Revenue Code. The case was tried in the Southern District of New York, before the Hon. Edward C. McLean, and a jury, commencing on March 10, 1966. On March 16, 1966, the jury returned a verdict of guilty on all three counts. On April 7, 1966, petitioner was sentenced to a term of imprisonment of six months on each count, to run concurrently.

On September 30, 1966, petitioner's appeal was argued in the United States Court of Appeals for the Second Circuit. Judgment of conviction was affirmed without opinion.

Petitioner is now at large on $1,000 bail pending determination of this petition.

In the court below, petitioner did not dispute his obligation to file returns for the years in question on or before the date specified in Section 6072 (A) of the Revenue Code. It was and is his contention that his failure to file on time was occasioned by the illness and neglect of petitioner's accountant, by petitioner's involvement in the construction and operation of a hospital, and by his busy medical practice. The returns were, in fact, filed in May, 1962.

When the members of the jury were being selected, the Trial Judge told them (3) that "The substance of the charge is that the defendant willfully and knowingly failed to file an income tax return for each of three years, the years 1958, 1959 and 1960."

At the conclusion of all the evidence, the Trial Judge instructed the jury as follows with respect to the crime charged (765):*

> "There are three elements to this offense charged, each of which the Government must prove beyond

* Numerals in parentheses refer to pages in the record.

> a reasonable doubt in order to prove the defendant guilty. These elements are, one, that in the calendar year 1958 defendant had a gross income of $600.00 or more; two, the defendant failed to file an income tax return for 1958 on or before April 15, 1959; three, that such failure to file was willful."

The Trial Judge then told the jury that the crimes charged in counts 2 and 3 of the information were the same as the crime charged in count 1, except for the years in question.

After the jury had been in deliberation for 90 minutes, a note was sent to the Trial Judge (780) wherein the jurors requested clarification as to whether petitioner was charged with "willful intent to not file a tax return, or willful intent to defraud the Government of tax evasion."

In answer to the jury's request, the Trial Judge repeated the same instructions he had previously given (781). Fifty minutes later, the jury returned its verdict of guilty (786). By repeating verbatim his prior charge, we suggest that the Trial Judge did not, with concrete accuracy, clear away the jury's difficulties.

In the course of the trial, the Government put the following question to the petitioner, on cross examination (481):

> "Q. Do you recall being in the office of the Internal Revenue Service, 245 West Houston Street, May 2, 1963, at about 10:15 a.m., where Mr. McGowan and Mr. Windwehr were present? A. Yes.
> "Q. Do you recall at that time that you were sworn in and testified at that time under oath? A. Yes."

Counsel for the Government then continued with the following question (484):

"Do you know whether that bank closed out your account because of the fact that you kited checks?"

The Trial Judge sustained petitioner's objection to the question, but denied his motion for a mistrial. The Government was then permitted to ask petitioner directly whether he did kite checks, to which petitioner replied that he did not.

The prosecution, reading from the document, then put the following question to petitioner:

"Do you recall on May 2, 1963, the following question and answer which you gave:

"'Q. What bank accounts do you personally maintain? A. Nanuet National Bank, Rockland National Bank, and then for some time I had one at the Pearl River State Bank, but they closed that out because I was kiting checks. I had at one time also one in the First National City Bank, which was also closed for unsavory reasons.'"

Petitioner objected to the question unless the Government produced a signed copy of the document from which its counsel was reading. When the objection was overruled, petitioner stated that he had not given such answer. We suggest that, by permitting the Government to read from a document petitioner's purported statement of prior wrongful acts wholly unrelated to the crime with which petitioner was charged, the Trial Judge committed prejudicial error.

During the course of the trial, the Trial Judge, on many occasions, took over the questioning of witnesses (387, 397, 398, 460, 461, 503, 505, 519 through 522, 659 and 660). In so doing, we suggest, the actions of the Trial Judge were most damaging to a fair presentation of the defense.

During the course of the trial, petitioner, on many occasions, objected to the introduction of evidence, which

objections were sustained by the Trial Judge. On not one of such occasions did the Trial Judge instruct the jury to disregard the testimony objected to (30, 39 through 42, 69, 194, 213, 225, 230, 253, 256, 275, 296, 311, 312, 460, 467, 472, 484, 510, 516, 525, 530, 562, 611 and 616). On the other hand, on occasions when the Government objected to testimony, the Trial Judge *did* instruct the jury to disregard the testimony objected to (133, 253). We suggest that the foregoing actions of the Trial Judge were most damaging to a fair presentation of the defense.

Reasons for Granting the Writ.

1. In *Bollenbach v. United States,* 326 U. S. 607 (1946), this Court said that a conviction ought not to rest on an equivocal direction to the jury on a basic issue. When a jury makes explicit its difficulties, a Trial Judge should clear them away with concrete accuracy. A charge, it was said, should not be misleading.

In the case at bar, the jury was misled at the beginning of the trial when the Trial Judge said that petitioner was charged with failure "to file an income tax return for each of three years, the years 1958, 1959 and 1960." Such was not the charge against the petitioner. He was charged with failure to file, *on time,* his tax returns for those years.

At the conclusion of the evidence, the Trial Judge instructed the jury as to the elements of the crime charged. By the very language it used in asking for clarification of the charge, i. e., "Is the charge willful intent to not file a tax return for above years or are the three charges willful intent to defraud the United States Government of tax evasion?" we suggest that the jury had not the faintest idea of the nature of the crime with which petitioner was charged. He was not charged with willful intent

to not file a tax return, nor was he charged with willful intent to defraud the Government. The charges against petitioner were willful failure to file tax returns on time.

The jury, having made explicit its difficulties, in accordance with the rules announced by this Court in *Bollenbach,* the Trial Judge should have cleared them away with concrete accuracy. He should have used different language to explain the nature of the crime with which petitioner was charged. Instead, the Trial Judge re-read to the jury the very same instructions previously given thereby, we submit, doing nothing to enlighten the jury as to the nature of the crime charged.

By reason of the foregoing, we submit that the Trial Judge's direction to the jury on this basic issue was equivocal. As a consequence, we suggest that the jury reached its verdict other than by the procedure and standards appropriate for criminal trials in the Federal Courts.

By its sanction of the procedure followed here, the Second Circuit has indicated a lack of compliance with, or understanding of, the rules announced by this Court in *Bollenbach* which, we submit, calls for rectification, both for justice's sake, and for the guidance of every Court in the country.

2. It has been well established that it is error to permit questions as to wrongful acts unrelated to the crime charged solely for the purpose of attacking credibility. This Court so held in *Boyd v. United States,* 142 U. S. 450 (1891). The Circuit Courts have so held in decisions too numerous to require citation.

In the case at bar, petitioner is charged with violations of the Revenue Code. On cross examination however, the Government asked him whether he had ever kited checks and, when he said he had not, waved a piece

of paper in front of the jury in which petitioner had purportedly admitted kiting checks. Petitioner denied making such admissions and the paper, which was unsigned, was not offered in evidence by the Government.

What, we ask, was the Government's purpose in this line of questioning if not to prejudice petitioner with the jurors, to draw their minds away from the real issues, and to produce the impression that petitioner was not a person entitled to the full benefit of the rules prescribed by law for the trial of persons charged with crime? By permitting questions as to petitioner's purported prior wrongful acts, we submit the Trial Judge committed prejudicial error.

We do not dispute the necessity for permitting the Trial Judge wide latitude in dealing with counsel, ruling on objections, and keeping the trial moving. We suggest, however, as has oft been stated, that the jury hangs on his every word, and is most attentive to any indication of his view of the proceedings.

Here, the Trial Judge on many occasions, took over the questioning of witnesses in detail. By so doing, we submit, the Judge indicated to the jury his impatience and displeasure with counsel for petitioner, and conveyed to the jurors that he thought little of what counsel was doing. During the course of the trial, the Trial Judge on many occasions, failed to instruct the jury to disregard testimony to which petitioner objected, when his objections were sustained. On the other hand, when the Government's objections were sustained, the jury *was* instructed to disregard the testimony objected to.

By reason of the foregoing, we submit, the Trial Judge indicated to the jury a biased view of the proceedings which was most damaging to a fair presentation of the defense.

By its sanction of the proceedings below, the Second Circuit has invited a lowering of the high standards set for criminal trials in the Federal Courts.

CONCLUSION.

For the reasons hereinabove set forth, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME B. TOBIAS,
Attorney for Petitioner.

Dated: Nanuet, New York
October 20, 1966.

APPENDIX A.

Statutory provision involved.

26 U.S.C. SECTION 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of Section 6015 or Section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

APPENDIX B.

Opinion of the United States Court of Appeals for the Second Circuit.

No opinion was rendered herein by the United States Court of Appeals for the Second Circuit.

APPENDIX C.

Judgment of the Court of Appeals sought to be reviewed.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the thirtieth day of September, One Thousand Nine Hundred and Sixty-six.

Present:

Hon. J. Edward Lombard,
Chief Judge,
Hon. Henry J. Friendly,
Hon. Irving R. Kaufman,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE S. STAYNER,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 727

GEORGE S. STAYNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial petitioner was found guilty on three counts of willful failure to file a timely income tax return for the years 1958, 1959, and 1960, in violation of § 7203 of the Internal Revenue Code of 1954. He was sentenced to concurrent six month prison terms on each of the counts. The court of appeals affirmed the conviction without opinion.

It is undisputed that petitioner's 1958, 1959 and 1960 income tax returns were not filed on time. All three returns were filed on May 24, 1962, after the Internal Revenue Service had sent three letters to petitioner (on June 27, 1961, January 2, 1962 and April 23, 1962) inquiring as to when and where he had

289-870—66

filed his 1960 tax return (G.A. 1a–5a, 135a–137a; Tr. 662–680).[1]

Petitioner's defense at the trial was lack of wilfulness. He blamed his failure to file timely returns on the illness and neglect of his accountant and on his own preoccupation with his medical practice. However, it was shown that during the period in question petitioner had found the time to take several trips abroad. In February 1959, petitioner, his wife and another couple flew a private plane to Colombia, where they spent six or seven days (Tr. 326, 421). In September 1959, he spent about five days in Denver, Colorado (Tr. 325, 493). In January 1960, petitioner, his wife and his parents took a five-day trip to Cuba (Tr. 326, 421). In August 1960, petitioner took a trip to Geneva, Lausanne, Zurich, Venice, Rome and Florence which lasted approximately five weeks (Tr. 326, 425–427, 491). Moreover, in early 1961, he and five others invested in and helped organize a small company, Phoenix Aircraft Manufacturing Corporation, which was developing a new concept in aircraft design (Tr. 402–403, 458–461). Petitioner admitted on cross-

[1] The returns as eventually filed reflected the following figures (G.A. 5a–7a; Govt. Exs. 2, 3, 4):

Year	Gross income	Taxable income	Taxes due and owing	Taxes withheld	Payments on estimated tax
1958	$28,193.86	$10,383.41	$2,299.69	0	$300.00
1959	26,669.45	3,037.84	607.57	0	0
1960	30,859.82	10,930.11	2,441.83	0	0

The designation "G.A." refers to the Government's Appendix in the court below. The designation "Tr." refers to the transcript of proceedings at the trial.

examination that he was aware of the duty to file income tax returns and that he knew such returns were due on April 15 of each year (G.A. 102a, 126a–127a).[2]

The lower courts were correct. There is no conflict of decisions or other reason for further review.

(1) Petitioner argues that the trial judge violated the rule of *Bollenbach* v. *United States*, 326 U.S. 607, that a conviction ought not to rest on an equivocal direction to the jury on a basic issue. In the case at bar the jury sent a note to the court indicating that one juror was confused as to whether petitioner was on trial for wilful failure to file returns or for wilful attempts to defraud the government of the tax (G.A. 159a). In response, the judge re-read to the jury those portions of his charge which related to the essential elements of the offense. After this was done the jury indicated that it was satisfied and the deliberations continued (G.A. 159a–163a). There was no error here; the court did exactly what it should have done. In the *Bollenbach* case, *supra*, the jury, after seven hours of deliberation, reported that it was hopelessly deadlocked. In response to a question put by the jury at that point the trial judge gave an erroneous "presumption" instruction which was in conflict with the presumption of innocence, and five minutes later a verdict of guilty was returned. There

[2] It was also undisputed that petitioner did not file timely returns for four earlier years, 1954 through 1957. The 1954, 1955 and 1956 returns were filed in 1958 (before any of the three returns involved in the instant case were due) and the 1957 return was filed on August 7, 1963 (G.A. 46a–47a, 90a–91a; Govt. Exs. 8, 9, 10, 14).

is no similarity at all between the instant case and *Bollenbach*. There was no equivocal or erroneous instruction here.

(2) Petitioner's second question (Pet. 7–8) relates to the propriety of permitting the government to show, on the cross-examination of petitioner, that he had kited checks. Such questioning was entirely proper, for petitioner had previously put his character in issue by calling ten character witnesses. *Michelson* v. *United States*, 335 U.S. 469, 476–479. (Since two of these ten witnesses were or had been associated with banks, petitioner appears to have been trying to create the impression that he enjoyed a good reputation generally and within the banking community—G.A. 12a–16a.)

(3) The trial court did not commit error in asking questions of petitioner and other witnesses. The record indicates that the court's sole interest was to understand and clarify the testimony, especially petitioner's which at times was very confusing. The fact that such questioning may have elicited testimony unfavorable to the defense provides no basis for holding that the trial judge abused his discretion. *United States* v. *Rosenberg*, 195 F. 2d 583, 594 (C.A. 2), certiorari denied, 344 U.S. 838; *Simon* v. *United States*, 123 F. 2d 80 (C.A. 4); *Hellman* v. *United States*, 339 F. 2d 36, 37–38 (C.A. 5); *United States* v. *Aaron*, 190 F. 2d 144 (C.A. 2), certiorari denied *sub nom. Freidus* v. *United States*, 342 U.S. 827.

(4) Petitioner contends, finally (Pet. 8), that the trial judge showed partiality in that he failed to in-

struct the jury to disregard testimony to which petitioner's objections were sustained, but "when the Government's objections were sustained, the jury *was* instructed to disregard the testimony objected to." Petitioner has offered no record citations to support this allegation. Our reading of the transcript disclosed that there were two occasions on which the judge instructed the jury to disregard testimony (Tr. 133, 253) and that at no time did the defense ever ask for such an instruction.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

DECEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966